LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 4

LOCAL UNION NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARTIN F. O'DONOGHUE
PATRICK C. O'DONOGHUE
DONALD J. CAPUANO
1912 Sunderland Place, N. W.
Washington 36, D. C.
Counsel for Petitioner

September 4, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
A. The Facts	3
B. The Decision of the Board	6
C. The Decision of the Court of Appeals	7
Reasons for Granting Writ	8
Conclusion	17
Appendix A—Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit, rendered June 6, 1963	1a
Appendix B—Pertinent Statutory Provisions	12a

CASES CITED

Binnings Construction, 138 NLRB No. 116 13
Board of Harbor Commissioners, 137 NLRB 1178 12
Cardinal Industries, 144 NLRB No. 16 (Aug. 23, 1963) 12, 13
Carleton Bros., 137 NLRB No. 80 13
IBEW, Local 1212 v. *National Labor Relations Board (CBS)*, 364 U.S. 573 ..... 15, 16
Local 636, U.A. v. *National Labor Relations Board*, 108 U.S. App. D.C. 24, 278 F. 2d 858 (1960) 7, 12
Local 761, I.U.E. v. *National Labor Relations Board*, 366 U.S. 667 ..... 10, 11
Local 1976, Carpenters v. *National Labor Relations Board (Sand Door)*, 357 U.S. 93 ..... 6, 7, 8, 9, 10
Minnesota Milk Co., 133 NLRB 1314 9
National Labor Relations Board v. *Drivers 639*, 362 U.S. 274 14

Page

National Labor Relations Board v. *Enterprise Assoc.*, 285 F. 2d 642 (2d Cir. 1960) 7, 12
National Labor Relations Board v. *Fruit & Vegetable Packers*, No. 88 (1963 Term, Cert. Granted June 10, 1963) 15
National Labor Relations Board v. *Local 825 Operating Engineers*, ... F. 2d ..., 52 LRRM 2757 (3d Cir. 1963) 14
National Labor Relations Board v. *Servette*, No. 111 (1963 Term, Cert. Granted, June 10, 1963) 15
Retail Clerks Loc. 770 v. *National Labor Relations Board*, 111 U.S. App. D.C. 246, 296 F. 2d 368 (1961) 10, 12
Seafarers International Union v. *National Labor Relations Board*, 105 U.S. App. D.C. 211, 265 F. 2d 585 (1959) 10, 11
Steelworkers Local 5895 v. *National Labor Relations Board*, No. 89 (1963 Term, Cert. Granted May 13, 1963) 14
Sunrise Transportation, 137 NLRB No. 98 9
Syracuse Supply, 139 NLRB No. 50 12
Timken Roller Bearing Co., 70 NLRB 500, rev'd. on other grounds, 161 F. 2d 949 (6th Cir. 1947) 9
Arthur Venneri Co., 137 NLRB No. 100, 50 LRRM 1266, 1270 ..... 14, 15
Wiggins Terminals, Inc., 137 NLRB No. 3 12

STATUTORY CITATIONS

Labor Management Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et seq.):

Sec. 7 3
Sec. 8(b)(1)(A) 14
Sec. 8(b)(4) 4, 7, 8, 9, 10, 11, 13, 14, 16, 17
Sec. 8(b)(4)(B) 7, 8, 15, 16
Sec. 8(b)(4)(D) 7, 8, 15, 16
Sec. 8(b)(4)(i)(ii)(B) 3, 5, 6, 7
Sec. 8(b)(4)(i)(ii)(D) 3, 5, 7
Sec. 8(e) 3, 8, 9
Sec. 10(k) 6, 7, 15, 16

Page

1 D. C. Code, Sec. 725 5

2 D. C. Code, Sec. 1406 (1961 Ed.) 5

43 Maryland Code Annot., Sec. 326, 329, 333, 334, 336 (1957 Ed.) 5

MISCELLANEOUS CITATIONS

105 Cong. Record 14195 (Daily Ed., Aug. 11, 1959) 9

105 Cong. Record 16415 (Daily Ed., Sept. 3, 1959) 9

House Conf. Report No. 1147 on S. 1555, 86th Cong., 1st Session 40 (1959) 9

9 Construction Review #2 (Feb. 1963), Department of Commerce 17

Cox, *Landrum-Griffin Amendments to National Labor Relations Act*, 44 Minn. L. Rev. 257, 273 9

84 Monthly Labor Review 715 (Part II) 13

St. Antoine, *Secondary Boycott and Hot Cargo: A Study in Balance of Power*, 40 Det. L. Rev. 189, 207 13

The Constructor (Jan. 1963, Associated General Contractors) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

LOCAL UNION NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 6, 1963.

OPINION BELOW

The Decision and Order of the National Labor Relations Board (J.A. 2)[1] including the Intermediate Report of the Trial Examiner (J.A. 22) is reported at 137 NLRB No. 100, 50 LRRM 1266. The opinion of the Court of Appeals is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1963. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does Section 8(b)(4)(i)(ii)(B) of the Labor Management Relation Act, 29 U.S.C. § 158(b) prohibit a union from inducing its members not to work on a job or from refusing to refer employees to an employer with whom it has a collective bargaining agreement, when, in either case, the employer is violating a valid primary job protection clause in the collective bargaining agreement.

2. Whether Section 8(b)(4)(B) and Section 8(b)(4)(D) of the Act are mutually exclusive and require, when a union is accused of violating both on the same set of facts, the jurisdictional question involved in the § 8(b)(4)(D) charge be resolved prior to the merits of the § 8(b)(4)(B) charge being determined.

[1] The record in the court below was printed in a Joint Appendix, cited herein as "J.A.," nine copies of which have been filed with this petition.

STATUTES INVOLVED

Sections 7, 8(b) (4) (i) (ii) (B), 8(b) (4) (i) (ii) (D), 8(e), and 13 of the Labor Management Relations Act, as amended, 29 U.S.C. §§ 157, 158(b), 158(e) and 163, hereinafter referred to as the Act.

The foregoing statutory provisions involved in this case are printed in Appendix B attached to this petition.

STATEMENT OF THE CASE

A. The Facts

Petitioner, Local 5 of Washington, D. C., has identical collective bargaining agreements with the Mechanical Contractors District of Columbia Association, Inc., and with several independent mechanical contractors in this area (J.A. 72, 121). These contractors perform plumbing and pipefitting work of every description, both inside and outside buildings in this area. The agreements contain a job protection clause—Section 32 of Article XVII (hereinafter referred to as Clause 32): (J.A. 125)

> "§ 32. It shall be a violation of this agreement for any contractor to contract for a job where plumbing work has been withheld from the plumbing contract by either the owner or general contractor for the purpose of being installed by other than journeymen plumbers and their apprentices. Plumbing work in this paragraph shall include the installation of all non-metallic sewers within the property line including both sanitary and storm as well as open drain tile."

Article VI and Section 6 of Article XV of the agreements provide that the contractor will install all piping in accordance with the work jurisdiction of the United Association and that plumbers will install all the pipe

in a plumbing system, including both the inside plumbing work and the outside sanitary sewers, water lines, and storm drains (J.A. 120).

In December 1959, Akron Mechanical Contractors, having previously operated non-union, asked to become a party to Petitioner's collective bargaining agreement so it could operate as a union contractor (J.A. 91, 96-98). This was done. Akron, at the same time, was apparently negotiating with the Venneri Company, a general contractor, to do some plumbing work at Andrews Air Force Base. He obtained a contract from Venneri for the inside plumbing and heating work on two hangars (the jobs here in dispute) but the contract did not include the installation of the outside pipe work (utilities). This violated Clause 32 of Akron's agreement with Petitioner. The outside pipe work was awarded to an excavating contractor, Nickles, for whom plumbers did not work. Akron was awarded other subcontracts from Venneri for work at Andrews, but on those jobs it contracted for both the inside and outside plumbing work.[2]

After learning that Akron had violated Clause 32 on the hangar jobs, Petitioner refused to refer any plumbers to those jobs and also told the plumbers on Akron's other jobs not to move or fabricate any pipe destined for the hangars. Petitioner also refused to

[2] Prior to the above jobs Venneri, in August of 1959, on the Library of Medicine job, subcontracted the outside pipe work to Nickles, and for this reason had difficulty in obtaining a union mechanical contractor to take only the inside plumbing work. Discussions were held with Petitioner and, since Venneri was new to this area, Petitioner waived Clause 32 for a mechanical contractor to take this job without violating the collective bargaining agreement (J.A. 69). (The amendments to § 8(b)(4) of the Act were adopted on September 14, 1959).

refer any plumbers to Nickles because he was not a Master Plumber (mechanical contractor) (J.A. 68). The policy of Local 5, as expressed in its collective bargaining agreement, was that, in the interest of public health and safety, only journeymen plumbers working for licensed Master Plumbers should install all pipe in a plumbing system (J.A. 124). Indeed, state statutes have, for obvious reasons, adopted the policy of Petitioner into law.[3]

Petitioner did not picket any jobs of Akron, Venneri, or Nickles, nor did it induce any employees of these employers (other than Akron's plumbers),[4] to strike. Petitioner never requested that Nickles, or his laborers, be removed from the job (J.A. 80, 108). Petitioner did not even interfere with the other craftsmen employed by Akron, such as operating engineers, sheet metal workers, etc., and initially Petitioner's members even worked for Akron on his jobs other than the hangar jobs. Petitioner in no way interfered with the replacements Akron hired to perform the plumbing work on the hangars. In other words, Petitioner limited its conduct to Akron and his plumbers.

Petitioner also submitted Akron's breach of Clause 32 to a joint management-labor conference board, as provided in its agreement (J.A. 115, 122), and this board found that Akron had violated the agreement in the manner alleged (J.A. 117). However, based upon the above described conduct, charges alleging violations of §8(b)(4)(i)(ii) (B) and (D) of the Act were filed against Local 5 by Venneri.

---

[3] 43 Maryland Code Annotated, §§ 326, 329, 333, 334, 336 (1957 Ed.). See 1 D.C. Code § 725 and 2 D.C. Code § 1406 (1961 Ed.).

[4] Steamfitters of a sister local union were also requested not to do the plumbing or heating work on the hangar jobs.

B. The Decision of the Board

The Board, in a three to two decision, held that the Petitioner's inducement of its members not to move or fabricate pipe violated Section 8(b)(4)(i)(B) of the Act, and its refusal to refer plumbers to Akron violated Section 8(b)(4)(ii)(B) of the Act. Venneri, not Akron, was the primary employer, according to the Board majority, because he had the control over the assignment of the work, and Petitioner's object was to get the assignment of the outside utilities from Venneri. Akron was allegedly a neutral party.

Clause 32 was not expressly ruled upon by the Board. The Board attempted to distinguish Clause 32 from a typical subcontracting restriction or job protection clause, but finally decided that it need not consider Clause 32 because it had already found the Union's conduct to be illegal and, in that event, the clause could not be a defense to the charge, citing *Local 1976 Carpenters* v. *NLRB, (Sand Door)*, 357 U.S. 93.

Member Brown dissented (J.A. 14) finding that the inducement of Akron's employees and the refusal to refer by Petitioner resulted because Akron breached Clause 32, a valid job protection clause. The union therefore had a primary dispute with Akron. Venneri was just a neutral party, and his business relationships were not an object of Petitioner's conduct. Member Brown pointed out that the Board was giving undue significance to the element of control of assignments in determining the relationship of the parties.

Member Fanning also dissented but on a different basis (J.A. 10). He objected to deciding this case before the Board considered the pending proceeding under Section 10(k) of the Act which came about as a

result of a Section 8(b)(4)(i)(ii) (D) charge filed against Petitioner at the same time the Section 8(b)(4)(i)(ii)(B) charge was filed, and based on the identical facts. Member Fanning basically argued that Section 8(b)(4)(B) and Section 8(b)(4)(D) are mutually exclusive and the latter should be determined first in view of its unique purpose in the Act. He pointed out that since the majority had already enjoined Petitioner from striking, it would be meaningless to later hold in a Section 10(k) proceeding that Petitioner was entitled to the work for which it was striking. There is no basis in the statute for holding, as the majority did, that a union found entitled to work in a Section 10(k) proceeding could use primary conduct to obtain the work but not secondary action.

C. The Decision of the Court of Appeals

On review, the Court of Appeals for the District of Columbia Circuit affirmed the decision of the Board. The Court concluded that Venneri was the primary employer, based, as was the Board's decision, on the element of "control" of the work assignments. The Court relied upon *Local 636 U.A.* v. *NLRB*, 108 U.S. App. D.C. 24, 278 F. 2d 858 (1960) and *NLRB* v. *Enterprise Association*, 285 F. 2d 642 (2nd Cir. 1960), two cases involving secondary or hot cargo type clauses, not clauses directly benefiting the employees of the employer as in this case.

The court below conceded that Clause 32 was not the same as a hot cargo clause and that its purpose was different from a hot cargo clause. It also assumed that Clause 32 was a valid primary clause. Nevertheless, despite these assumptions and concessions, the court still found the case controlled by *Sand Door*,

supra, and that Clause 32 was really aimed at Venneri, not Akron. The court, with limited discussion, also found, as did the Board, that the refusal to refer in this case was restraint and coercion and that §§ 8(b)(4)(B) and 8(b)(4)(D) are not mutually exclusive.

REASONS FOR GRANTING WRIT

1. The lower court misconstrued and misapplied the decision of this Court in *Local 1976 Carpenters v. National Labor Relations Board (Sand Door)*, 357 U.S. 93.

The lower court, in considering Petitioner's argument that it was engaging in the admitted conduct to protest Akron's breach of Clause 32, assumed that Clause 32 was a valid job protection clause, not proscribed by Section 8(e) of the Act, or included within the construction industry proviso to Section 8(e) (*infra*, App. B, p. 13a); ergo, it was a valid primary subcontracting restriction or job protection clause. The court then proceeded to find that, while this may be true, Petitioner could not take the action it did to protest the violation of Section 32 because of this Court's holding in *Sand Door*, *supra*. The lower court reasoned that Clause 32 was not a hot cargo clause but that *Sand Door* was not limited to only hot cargo or secondary type clauses. In other words, in the opinion of the lower court, *Sand Door* held strikes to protest the breach of valid subcontracting clauses (not covered by Section 8(e) of the Act) to be violative of Section 8(b)(4) of the Act.

Sand Door, in this Petitioner's opinion, was very definitely limited to hot cargo (hot goods) or secondary type clauses and, in fact, the expressed purpose of

Section 8(e) of the Act, adopted in 1959, was to declare void the type of clause involved in *Sand Door* and similar hot cargo clauses.[5] However, Congress did not intend to outlaw traditional subcontracting clauses by Section 8(e), despite the literal language of the section,[6] and the construction industry proviso only exempts from Section 8(e) the type of clause which would, but for the proviso, be included in Section 8(e). To this latter group, then, *Sand Door* would probably apply,[7] but if the lower court assumed, as we submit is true, that Clause 32 was not covered by either Section 8(e) or the construction proviso, then *Sand Door* would not be applicable.

The lower court also misapplied the holding in *Sand Door* to this case. *Sand Door* held that a hot cargo clause may not legalize conduct which would otherwise be illegal under Section 8(b)(4). This Court, in *Sand Door*, did not consider the question of whether there was a violation of Section 8(b)(4) of the Act, that is, illegal conduct and a proscribed object, and expressly declined to review the Board and lower court's rulings on this issue which were against the Petitioners. 357 U.S. at 96 n. 1. The only question before the Court

---

[5] See 105 Cong. Rec. 14195 (Daily Ed. Aug. 11, 1959) (Remarks of Representative Griffin: "Our substitute would ban all hot-cargo agreements.") and H. Conf. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. 40 (1959).

[6] *Sunrise Transportation*, 137 NLRB No. 98; *Minnesota Milk Co.*, 133 NLRB 1341; and *Cox, Landrum-Griffin Amendments to NLRA*, 44 Minn. L.R. 257, 273. Such clauses are mandatory subjects of bargaining and may be enforced by strike action. *See Timken Roller Bearing Co.*, 70 NLRB 500, *rev'd on other grounds*, 161 F. 2d 949 (6th Cir.; 1947)

[7] See 105 Cong. Rec. 16415 (Daily Ed. Sept. 3, 1959) (Senator Kennedy).

was whether the hot cargo clauses excused conduct which otherwise "would unquestionably be a violation" of Section 8(b)(4). 357 U.S. at 101.

Petitioner herein did not argue that Clause 32 was a defense for otherwise illegal conduct, and the lower court recognized this (App. A, p. 5a). But rather than answer this contention, the court recast Petitioner's argument into the mold of *Sand Door* and then applied the *Sand Door* rationale. Petitioner's position, both before the Board and the lower court, was that Section 32 was a valid subcontracting or job protection clause and, in determining what was the object of Petitioner, Clause 32 must be considered as evidence of its object, not a possible defense after a violation of the Act has been found. This distinction is important, and unless this Court amplifies its holding in *Sand Door*, it is quite obvious that all valid subcontracting clauses will be brushed aside when a charge of violation of Section 8(b)(4) is made and the case determined without a consideration of probably the most important evidence to support a Union's contention of primary action.

2. The lower court failed to properly apply the decision of this Court in *Local 761 IUE* v. *NLRB*, 366 U.S. 667.

In *Local 761 supra*, this Court recognized that it is difficult in many secondary boycott cases to determine whether union conduct has an effect of inducing secondary parties to take certain action and conduct which has as an object the inducing of the secondary parties to take the same action. Only in the latter situation is the activity of the union proscribed by Section 8(b)(4)(B). *Retail Clerks, Local 770* v. *NLRB*, 111 U.S. App. D.C. 246, 296 F. 2d 368 (1961), and *Seafarers Interna-*

tional Union v. *NLRB*, 105 U.S. App. D.C. 211, 265 F. 2d 585 (1959). The problem is not susceptible to quick definitive formulas, and therefore, this Court approved the "means" test, as applied by some lower courts, i.e., the court must look to the means employed by a union to promote its cause in determining the object. In the subject case, the court ignored this legal "means" test and this caused the court to err in differentiating between the object and effect of Petitioner's conduct. The Petitioner did not picket Akron, or any other employer on the job; it did not interfere with other employees of Akron, or other employees on the job, such as operating engineers sheetmetal workers and laborers; it did not request the removal of Nickles or his laborers from the job; never approached Nickles, and it did not interfere with the replacement plumbers hired by Akron from other sources. The lower court found, as a matter of law, that these facts were unimportant and "beside the point" (See App. A, p. 7a). This ruling, Petitioner submits, is contrary to the holding of this Court in *Local 761, IUE, supra.* A consideration of these factors by the Board and the Court on review was essential to determine the object of Petitioner's conduct.

An important element in this case is the extensive reliance on the theory of "control of work assignments" by the court below and the Board in determining that Venneri, not Akron, was the primary employer. Of course, with this theory a determination of who has control over the work in a situation such as this is tantamount to a finding of a violation of Section 8(b)(4). There is nothing in the statute which gives this factor more significance than any other in determining whether a violation has been committed, and its use, to the exclusion of other

factors is inconsistent with this Court's holding in *Local 761, supra.* Basically, the theory is that if the employer, against whom action is taken, does not have the ability to satisfy what the Board determines to be the demands of the union, but some other employer on the job has this ability, then the latter is the primary, and activity directed at the former is secondary and prohibitive. The District of Columbia Circuit adopted the theory in *Local 636* v. *NLRB, supra,* and that decision was approved by the Second Circuit in *NLRB* v. *Enterprise Association, supra.* Later, the District of Columbia Circuit rejected the control theory in *Retail Clerks, Local 770* v. *NLRB, supra,* a case which the lower court here attempted to distinguish on the facts. A majority of the Board has vacillated on the theory, relying upon it in the instant case and others[8] but also ignoring it.[9]

There has been sharp disagreement among the Board Members as to the validity of the control theory. Member Brown, in dissenting from the view of the majority of the Board, has consistently taken the position that " 'the majority ignores the basic nature of the dispute and makes an incidental factor . . . the extent to which an employer could satisfy the union's demands . . . the determinative consideration.' The majority thus disregards the obvious fact that in a lawful primary strike, employers may not be willing or at times even able to satisfy their employees' lawful demands." *Cardinal Industries, Inc., supra,* at p. 5 (slip opinion).

---

[8] *Cardinal Industries*, 144 NLRB No. 16 (Aug. 23, 1963); *Wiggins Terminals, Inc.*, 137 NLRB No. 3, and *Board of Harbor Commissioners*, 137 NLRB 1178.

[9] See *Syracuse Supply*, 139 NLRB No. 50, in which *Retail Clerks Union, Local 770* v. *NLRB, supra,* was cited as support.

The importance of the approach of the Board and court below on this issue (not to mention the obvious confusion caused by the apparent inconsistent decisions on the same issue) is manifest. The construction industry generally operates through the use of subcontractors, roughly divided by the type of craft or the work they perform. Their work is intermittent, the jobs of short duration and different types.[10] If the approach adopted here is to be the law, general contractors, as a favored class, are given carte blanche to destroy all traditional concepts of craft jurisdiction. Unions will have to refer men to subcontractors no matter how much work the general contractor awards to the subcontractor, or how much work the subcontractor accepts. A union's craft jurisdiction and its job protection clauses will be meaningless. The breadth of this holding, in its effect on traditional means of conducting labor management relations in a large segment of our economy, makes review by this Court appropriate.[11]

The importance of the issue here is even further heightened by the amendment to the Act in 1959 which

---

[10] See 84 Monthly Labor Review 715 (Part II). Because of the distinct character of the construction industry the typical subcontracting restrictions are ineffective because they may be circumvented by the general contractor withholding work from the subcontractor. Under the typical clause, if the subcontractor doesn't have certain work, the employees can't claim it. For a discussion of typical subcontracting restrictions, see St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in Balance of Power*, 40 Det. L.R. 189, 207.

[11] Clauses such as Clause 32 are common throughout the building industry. See, for example, *Cardinal Industries, Inc., supra*; *Carleton Bros.*, 137 NLRB No. 80; and *Binnings Construction*, 138 NLRB No. 116.

added subsection (ii) to Section 8(b)(4),[12] and the holding of the lower court that the refusal to refer here was restraint and coercion, although the facts did not so demonstrate "as clearly as one might wish." (See App. A, p. 8a), 53 LRRM 2424, 2427. The Board went even further and found a refusal to refer to be per se restraint and coercion.[13] These holdings assure a contractor that even though he breaks the job protection clause of his collective bargaining agreement, the union must still remain his source of skilled journeymen. This result is harsh indeed, and the issue is one only this Court can decide and should decide so that all parties to collective bargaining agreements will be cognizant of their rights and obligations.

3. The question presented here is the same question presented in *Steelworkers Local 5895* v. *NLRB*, No. 89 (1963 Term, Certiorari granted May 13, 1963) only in different context.

Both cases involve the distinction between the object of union conduct and merely the effect of that conduct as it relates to Section 8(b)(4) of the Act. In *Steelworkers, supra*, the lower court based its decision primarily upon the ownership of the property upon which the picketing was conducted, *NLRB* v. *Steel-*

---

[12] "It shall be an unfair labor practice for a labor organization or its agents . . . (ii) to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . ."

[13] *Arthur Venneri Co.*, 137 NLRB No. 100, (J.A. 2). See *NLRB* v. *Local 825 Operating Engineers*, —— F. 2d ——, 52 LRRM 2757 (3rd Cir., 1963). Neither the lower court nor the Board considered the meaning of the words "restraint" and "coercion" used in another section of the Act, and defined by this Court in *NLRB* v. *Drivers Local 639*, 362 U.S. 274 (peaceful minority union picketing was not restraint and coercion under Section 8(b)(1)(A) of the Act).

workers Local 3895, 311 F. 2d 135 (2nd Cir., 1962), and, in the instant case the decision rested in part on which employer had control of the work assignments. The issues are related in that they both involve the basic application of the rules of law developed under Section 8(b)(4). It is respectfully suggested that many of the problems still surrounding this section of the Act, after 15 years of litigation, could appropriately be disposed of by a consideration of these two cases.[14]

4. The second question presented, i.e., § 8(b)(4)(B) and § 8(b)(4)(D), are mutually exclusive and the jurisdictional issue involved in the latter should be decided before the § 8(b)(4)(B) charge is considered—involves an important aspect of statutory construction which this Court will ultimately have to decide.

This issue caused a sharp disagreement among the Board members in the instant case[15] and it is difficult to see how further litigation on the matter, without guidance from this Court, will be of assistance to unions and employers. Section 8(b)(4)(D) and Section 10(k) have belatedly acquired equal status with their sister sections of the Act since *IBEW Local 1212 v. NLRB (CBS)*, 364 U.S. 573. Prior to *CBS, supra*, these sections, as interpreted by the Board, were, for all practical purposes, ineffectual. In *CBS, supra*, this Court directed the Board to make affirmative work assignments in Section 10(k) proceedings when a charge is filed under Section 8(b)(4)(D) of the

---

[14] The Court has also granted certiorari in two other cases involving different aspects of § 8(b)(4)(B), *NLRB v. Fruit and Vegetable Packers*, No. 88, and *NLRB v. Servette*, No. 111.

[15] See *Arthur Venneri Co.*, 137 NLRB No. 100, (J.A. 10) (dissenting opinion, Fanning), and *Board of Harbor Commissioners*, 137 NLRB No. 117.

Act. Since these provisions of the Act, both unique, have acquired great significance since *CBS, supra*, the difficulty of enforcing them consistently with other provisions of the Act, has become obvious.

The Board and the lower court found that Section 8(b)(4)(D) prohibits both primary and secondary activity in support of a jurisdictional claim but that the converse is not true, only primary activity is permitted in support of such claim. Member Fanning pointed out that nothing in the statute supports this reasoning. He suggests a method of harmoniously interpreting the two subsections of Section 8(b)(4) consistent with the congressional intent of favoring voluntary adjustments of jurisdictional disputes. Certainly unions, particularly in the construction industry, which must litigate their claims to jurisdiction in long and expensive Section 10(k) proceedings, as now applied,[16] are entitled to know that if they prevail they will be allowed to strike their employer. In the present context of the law, it is an empty victory indeed for a charged union to be awarded certain work in a Section 10(k) proceeding many months after the Board, in a Section 8(b)(4)(B) proceeding, enjoined the union from striking for the same work.

Problems inherent in Section 8(b)(4)(D) and Section 10(k), but latent until *CBS*, now must be answered. There are many, but further litigation, without some guidance from this Court, will not precipitate solutions.

5. The lower courts have great difficulty in interpreting, with clarity, the so-called secondary boycott

---

[16] The record in the § 10(k) proceeding in the instant case consists of approximately 9,000 pages of testimony and over two hundred exhibits. It is now pending before the Board.

section of the Act. This Court has considered the issues involved in Section 8(b)(4) on several occasions but, from the discussion above, it is obvious that further refinement is necessary.

The instant case involves a common situation in the construction industry[17] where, it will be admitted, Section 8(b)(4) has its most devastating effect. Petitioner suggests, therefore, that this case is an appropriate vehicle for this Court to consider the problems raised in this petition.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

MARTIN F. O'DONOGHUE
PATRICK C. O'DONOGHUE
DONALD J. CAPUANO
Counsel for Petitioner

---

[17] In 1962, $61,000,000,000 was spent in the United States on new construction (11% of the gross national product). On an average, 2.7 million workers were employed monthly on this work. (Repair and maintenance work not included.) 9 Const. Review #2 (Feb. 1963, Dept. of Commerce), and "The Constructor," (Jan. 1963, Associated General Contractors).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,130

LOCAL NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside, and on Cross-petition for Enforcement of, an Order of the National Labor Relations Board

---

Decided June 6, 1963

Mr. Donald J. Capuano, with whom *Mr. Patrick C. O'Donoghue* was on the brief, for petitioner. *Mr. Martin F. O'Donoghue* also entered an appearance for petitioner.

Mr. Gary Green, Attorney, National Labor Relations Board, with whom *Messrs. Stuart Rothman*, General Counsel at the time of argument, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before BASTIAN, BURGER and WRIGHT, Circuit Judges.

BASTIAN, *Circuit Judge*: This case is before the court on a petition to review and set aside an order of the National

Labor Relations Board. The Board, in its answer, has requested enforcement of the order.

The facts of the case are as follows: On November 30, 1959, the Arthur Venneri Company [Venneri], a general contractor, was awarded a construction contract by the United States Corps of Engineers to build two airplane hangars at Andrews Air Force Base, Maryland. Venneri then subcontracted the inside plumbing work to Akron Mechanical Contractors, Inc. [Akron] and the outside utilities to Nickles Bros., Inc. [Nickles], an excavating contractor, which had a bargaining agreement with the Hod Carriers, Building and Common Laborers Union of America. After it had been awarded the subcontract, Akron entered into a bargaining agreement with petitioner, Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO [Local 5], to obtain union plumbers for the construction of the hangars. That agreement contained a clause which reads, in pertinent part:

> "*32.* It shall be a violation of this agreement for any contractor to contract for a job where plumbing work has been withheld from the plumbing contract by either the owner or general contractor for the purpose of being installed by other than journeymen plumbers and their apprentices. . . ."

After the bargaining agreement was signed, Local 5 learned that Akron had accepted only inside plumbing work. Forthwith, it claimed jurisdiction over both the inside and the outside plumbing, objecting to Akron's acquiescence in the assignment of some of the plumbing work to Nickles, since installation of any plumbing by Nickles would violate clause 32 of the bargaining agreement. To further its claim, Local 5 refused to refer plumbers to work on the hangar jobs; and it induced Akron's employees to refrain from working on these projects, not to move pipe en route to the hangars, nor to fabricate pipe

destined for these buildings. These actions both the Board and the trial examiner found violated § 8(b)(4)(i) and (ii)(B) of the Labor-Management Relations Act, as amended.[1] We think the Board's determination has ample support in the record.

Respondent's argument rests on a triangular base. To sustain its findings the Board admits there must be substantial evidence in the record that (1) Local 5 induced the employees of Akron and threatened or coerced Akron (2) in order to affect the employment policies of an employer other than Akron (in this case Venneri), (3) one purpose of which was to force Akron to stop doing business with Venneri or, in the alternative, to force Venneri to stop doing business with Nickles. We shall consider these elements in reverse order.

---

[1] 61 STAT. 139 (1947), as amended, 29 U.S.C. § 158 (Supp. III, 1959-61):

"*Unfair labor practices.*

* * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . . ."

First, the evidence is clear that Local 5 wanted one of two resolutions of this dispute: Either it wanted Akron to stop doing business with Venneri, or it wanted Venneri to stop doing business with Nickles. The record indicates that the union would not supply plumbers to Nickles, refusing to have anything to do with that employer. In addition, there is evidence that Local 5 would not do business with any excavating contractor. In view of this attitude, there is no way that the provisions of clause 32 could be followed while both Akron and Nickles remained on the plumbing job.

Since Venneri had entered into contractual relations with both Akron and Nickles by the time this controversy arose, we have no occasion to consider the union's interesting argument that it sought "to force Akron to 'refrain' from doing business with Venneri," an object which it urges is permitted by the wording of the statute. In the present controversy it is clear that the union sought to force Akron to cease doing business with Venneri or, in the alternative, to force Venneri to cease doing business with Nickles.

The record also indicates that the real target of the union's conduct was the subcontracting policy of Venneri. The union warned Venneri in December 1959, apparently before Akron was in the picture, not to split the plumbing work, and reminded the contractor of previous trouble they had experienced on this point. The union also warned Grossman, the president of Akron, before the bargaining agreement was signed, that accepting work from Venneri might mean trouble. Furthermore, the discussion at the meeting on February 15, 1960, between Local 5, Akron and Venneri clearly showed that the union's primary concern was with Venneri's subcontracting policies and not with the policies of Akron.

Buttressed by a persuasive record, the Board further relies on *N.L.R.B.* v. *Enterprise Association, etc.*, 285 F.2d 642 (2d Cir. 1960) and *Local 636, etc.* v. *N.L.R.B.*, 108 U.S.

App.D.C. 24, 278 F.2d 858 (1960). Both of these cases reflect a situation similar to the present one, for in both the union brought pressure on a subcontractor who was powerless to settle the dispute, as is Akron here, in order to affect the purchasing policies of a general contractor. The only significant difference in this case is that the union attempted to influence the subcontracting policies of the general contractor, rather than its purchasing policies. There is nothing in the statute to indicate that this difference should produce a dissimilar result, for in both cases we have a secondary boycott.[2]

The union's principal reliance is on clause 32 of the contract, which we assume, *arguendo* only, is a legal contractual provision. On the basis of this clause, the union makes a two-pronged argument.

First, the union contends this clause demonstrates that its real dispute was with Akron, and not with Venneri, for it shows that the union's object was to change the employment policies of the immediate employer. The union presses on us a fine example of the *non sequitur*. Clause 32 no more demonstrates that the real target of the union's pressure was Akron than a "hot cargo" clause in the contract forbidding Akron to purchase non-union material would show that the union's dispute was with Akron, rather than its suppliers.[3] The subcontracting prohibition in *En-*

---

[2] *Retail Clerks Union Local 770* v. *N.L.R.B.*, 111 U.S. App. D.C. 246, 296 F. 2d 368 (1961), cited by petitioner, does not support the union. The court there held that the Board's determination did not conform to the language of the statute. In *Local 770*, the employer had the power to satisfy the union's demands; there was no question of subcontracting and its unique problems.

[3] To be sure, the purpose of a "hot cargo" clause may be different from the purpose of clause 32 (though this need not always be true), but the question before us is: At whom was the union's pressure directed? On this point the clause does not substantiate the union's contention.

terprise and the restriction on off-site fabrication in *Local 636* do not demonstrate that the dispute was with a party to the contract. As we said in *Local 636:*

> "The question is whether the contract provisions in question extend beyond the employer and are aimed really at the union's difference with another employer." 108 U.S.App.D.C. at 30, 278 F.2d at 864.

There is ample evidence in this case to show that the contract provision here in question was really aimed not at Akron, but at the union's difference with Venneri over the later's subcontracting policies.

The second argument of the union is that, if clause 32 is a valid prohibition designed to preserve jobs or job content,[4] then the union can take the measures here employed to enforce it. The Board correctly counters with the argument that *Sand Door*[5] disposes of this suggestion. That case teaches us that regardless of the legitimacy of the end sought by the union, it cannot engage in secondary pressure to obtain it. We find nothing in this case which distinguishes it from that rule. Admittedly, clause 32 is not identical to the "hot cargo" provision in *Sand Door*, but that case is not limited to "hot cargo" clauses. As the Supreme Court said:

> ". . . [I]t seems most probable that the freedom of choice for the employer contemplated by § 8(b)(4)(A)

---

[4] The union urges that clause 32 is not a typical work protection clause exempted under the provisions of § 8(e) of the Act. On appeal the Board does not argue this point. We therefore decline to pass upon the question of whether this is a § 8(e) exemption clause and whether such an exempted clause may be enforced by means proscribed by § 8(b)(4)(B). We also assume, *arguendo*, that clause 32 is a valid prohibition even though it does not come within the § 8(e) exemption.

[5] *Carpenters' Union* v. *Labor Board*, 357 U.S. 93 (1958); see also *N.L.R.B.* v. *Bangor Building Trades Council*, 278 F. 2d 287 (1st Cir. 1960).

> is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties. . . . This is so because by the employer's intelligent exercise of such a choice under the impact of a concrete situation when judgment is most responsible . . . Congress may rightly be assumed to have hoped that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited." *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 105-106 (1958).

We realize that this conclusion may leave the union with a valid contractual provision and with no means of enforcing it other than in a civil suit.[6] We also realize the difficulty the building crafts have with the secondary boycott provisions of the Labor-Management Relations Act,[7] but this court is not the forum in which to seek relief from what the union characterizes as "the shackles" of this statute.

The union also offers various subsidiary arguments. For example, it urges that the union's conduct should be sanctioned because Akron violated its contractual promise. Of this there is little doubt, but that is beside the point, for

---

[6] Cf. Previant, Boycotts under the 1959 Amendments, XIII N.Y.U. Conf. on Labor, 141 at 169.

[7] Meyer, "Ally" or "Neutral"—The Secondary Boycott Dilemma, 34 Tulane L.R. 343, 349-52 (1960); Segal, Differences among Secondary Boycotts and the Taft-Hartley Act, 5 Wayne L.R. 195, 205-8 (1959); Previant, *supra* note 6; Aaron, The Labor-Management Reporting & Disclosure Act of 1959, 73 H.L.R. 1086, 1112-1121 (1960). Note, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.R. 672, 689 (1951).

a secondary boycott is not justified, even when used as a retaliatory weapon.

Likewise beside the point is the argument that the Union used restraint in this dispute.[8] Even if this were true, such restraint does not indubitably indicate a permitted object. It may indicate, as it does here, merely a restrained manner of pursuing a proscribed end.

Thirdly, the union contends that its refusal to refer employees to Akron was not to "threaten, coerce, or restrain any person," within the meaning of the Act. We need not pass on the contention of the Board that any refusal to refer employees is to coerce or restrain. The facts in this case demonstrate, perhaps not as clearly as one might wish, but nevertheless adequately to sustain the Board's finding, that Akron was in fact dependent upon the union for employees and the union's refusal under such circumstances was to "coerce or restrain," within the meaning of the Act.

The union urges in addition that § 8(b)(4)(B) and § 8(b)(4)(D) are mutually exclusive, so that in the present case, where the union has been accused of violating both section, the Board cannot determine a union violation of § 8(b)(4)(B) before it determines the jurisdictional question under § 8(b)(4)(D). The Board answers that the two sections are not mutually exclusive, so that, even if the union prevails in the jurisdictional question, a secondary boycott is not permitted.

The Board has held that where a primary employer alone is involved, and the union has been charged with violation of § 8(b)(4)(D) as well as with some other violation of the statute, the § 8(b)(4)(D) determination will take precedence. This does not mean, however, that when a secondary employer is involved a § 8(b)(4)(D) determination

[8] Cf. *Electrical Workers* v. *Labor Board*, 366 U.S. 667 (1961).

must precede a determination of the secondary boycott. The secondary boycott provisions of the Act were designed to restrict the field of combat in industrial disputes. § 8(b)(4)(B) attempts to isolate labor disputes by declaring "off limits" to union pressure certain employers who are powerless to resolve a dispute between the union and another employer. To that end the Board has correctly concluded that, where the union brings pressure on one of these "neutral" parties, that activity is proscribed regardless of the jurisdictional question. The union would have to restrict its pressure in such a situation to the employer who can satisfy its demands.

The case cited to us by the union to show that the Board has changed its mind about §§ 8(b)(4)(D) and 10(k),[9] does not justify the position for which it is offered. In that case the union took direct action against the primary employer. There was no question of a secondary boycott. All that was there decided was that, in a primary dispute, the jurisdictional question should be resolved before the other primary questions.

Finally, the union contends that the present order is too broad. This order directed the union to cease and desist from:

> "(a) Engaging in, or inducing or encouraging employees of [Akron], or of any person engaged in commerce or industry affecting commerce, to engage in a strike or refusal in the course of their employment to use . . . any goods . . . or to perform any services where an object thereof is to force or require [Akron], or any other employer or person to cease doing business with [Venneri], or to force or require [Venneri] or any other person to cease doing business with [Nickles].

---

[9] *Local 502 Hod Carriers* v. *N.L.R.B.*, 140 N.L.R.B. #69, 52 L.R.R.M. 1092, 63-1 CCH N.L.R.B. § 12032.

"(b) Threatening that it will not refer or otherwise furnish individuals for employment to [Akron], or any other person engaged in an industry affecting commerce, according to the provisions of an applicable contract, or refusing to refer such individuals for employment, in order to force or require [Akron], or any employer or other person to cease doing business with [Venneri], or to force or require [Venneri] or any other person to cease doing business with [Nickles]."

The union objects to the inclusion of the words "or any other person" in the order since there is no showing that any companies except Akron, Venneri and Nickles are involved in the present controversy. There is evidence, however, that the union's activities were directed not only to forcing Venneri to terminate Nickles' plumbing subcontract but also to forcing Venneri not to subcontract part of the plumbing work to any utility subcontractor. It is possible that the order might be construed to cover situations far removed from the present one, but in so far as this order attempts to prohibit the union from bringing similar pressure on a subcontractor to force Venneri to cease doing business with a utility subcontractor, it is valid. Cf. *Bakery Wagon Drivers* v. *N.L.R.B.*, —— U.S. App.D.C. ——, —— F.2d —— (1963), No. 17,200, decided May 23, 1963.

The union is quite correct, however, in urging that any reference to the Corps of Engineers in the "Notice to All Employees," whose publication is required by the Board, should be stricken. There is no evidence of any threat or coercion to force the Corps of Engineers not to do business with Venneri.

As modified, the order will be enforced.

So ordered.

Filed June 6, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,130

LOCAL NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: BASTIAN, BURGER and WRIGHT, *Circuit Judges.*

Judgment

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside, and a cross-petition for enforcement of, an order of the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case be modified as indicated in the opinion of this court and, as so modified, will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Circuit Judge Bastian.

Dated: June 6, 1963

APPENDIX B

Pertinent provisions of the Labor-Management Relations Act of 1947, 61 Stat. 136, as amended, 29 U.S.C. 151, et seq., (1959) are as follows:

Sec. 7, 29 U.S.C. § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Sec. 8(b)(4)(i)(ii)(B)(D), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • •

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

• • • •

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturers, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such

labor organization has been certified as the representative of such employees under the provisions of section 9; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

* * * *

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . ."

Sec. 8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e):

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided, further, That for the purpose of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel

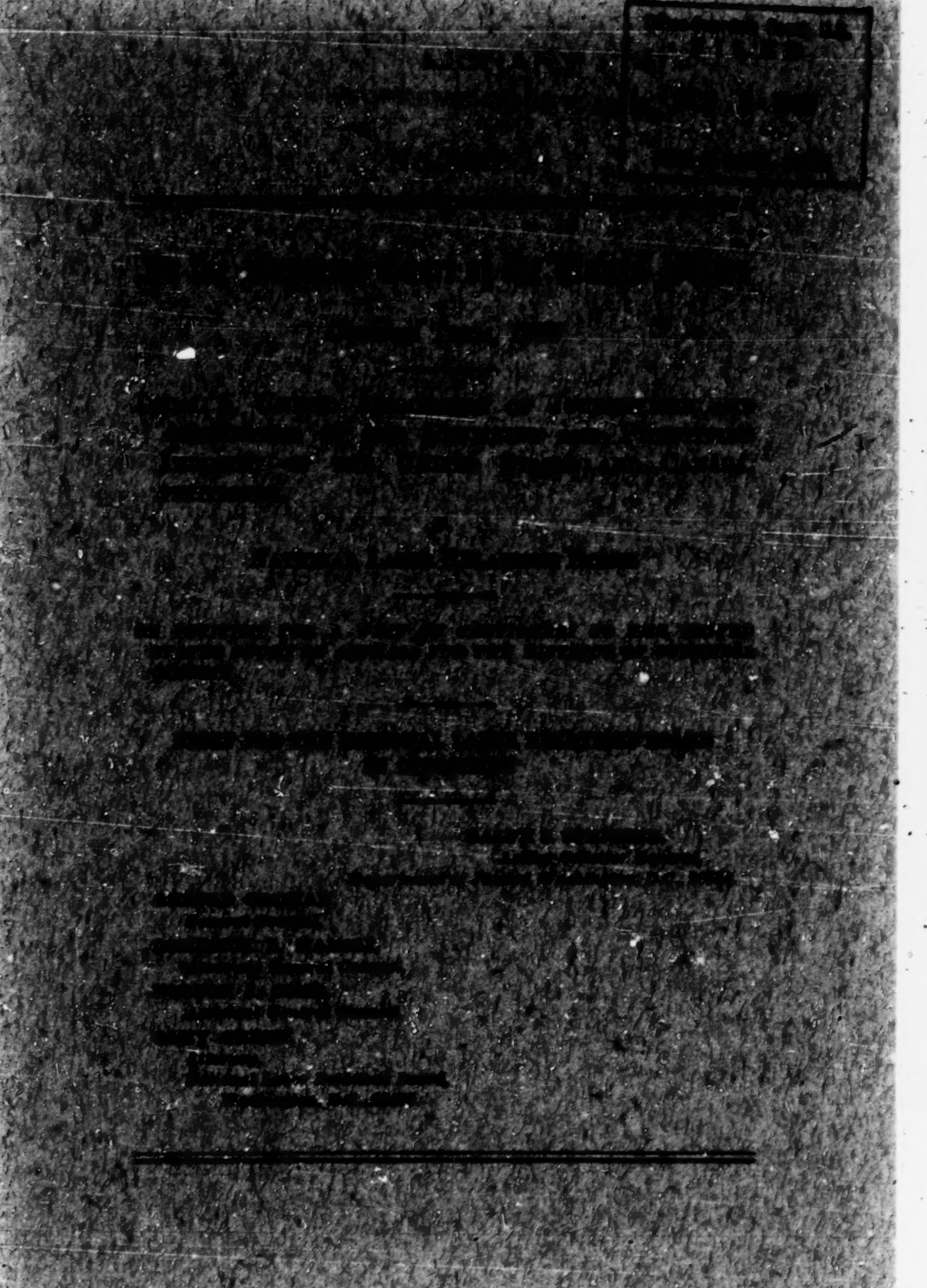
and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

Sec. 10(k), 29 U.S.C. § 160(k):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Sec. 13, 49 Stat. 457 (1935) as amended 29 U.S.C. 163 (1959):

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	5
C. The decision of the court of appeals	6
Argument	6
Conclusion	11

CITATIONS

Cases:	
Local 636; Plumbers v. *National Labor Relations Board*, 278 F. 2d 858	7
Local 761, IUE v. *National Labor Relations Board*, 366 U.S. 667	8
Local 1976, Carpenters v. *National Labor Relations Board (Sand Door)*, 357 U.S. 93	8
National Labor Relations Board v. *Enterprise Association*, 285 F. 2d 642	7
Steelworkers, Local 5895 v. *National Labor Relations Board and Carrier Corp.*, No. 89, this Term	8
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(b)(4)(B)	6, 7, 9, 10
Section 8(b)(4)(D)	6, 9, 10
Section 8(b)(4)(b)(B)	5
Section 8(b)(4)(ii7(B)	5
Section 10(k)	10

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 436

LOCAL 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–10a) is not yet reported. The Board's decision and order (J.A. 2)[1] are reported at 137 NLRB 828.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1963 (Pet. 11a). The petition for a writ of certiorari was filed on September 4, 1963. The

[1] "J.A." refers to pages of the record printed as a joint appendix in the court below.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Union's primary dispute was with the general contractor rather than with his subcontractor, so that the imposition of pressure on the latter and his employees was secondary and thus prescribed by Section 8(b)(4)(B) of the National Labor Relations Act.

2. Whether the Board is precluded from finding that the Union has violated Section 8(b)(4)(B) of the Act until it has first determined the merits of another charge arising from the same controversy, alleging that the Union has engaged in a jurisdictional strike in violation of Section 8(b)(4)(D).

STATUTE INVOLVED

The relevant statutory provisions are set forth at pp. 12a–14a of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Local 5 has a collective bargaining agreement with many of the mechanical contractors who perform pipe and plumbing work in the Washington, D.C. area. (J.A. 61–62, 121). Clause 32 of the contract provides that (J.A. 125):

> It shall be a violation of this agreement for any contractor to contract for a job where plumbing work has been withheld from the plumbing contract by either the owner or gen-

> eral contractor for the purpose of being installed by other than journeymen plumbers and their apprentices. Plumbing work in this paragraph shall include the installation of all non-metallic sewers within the property line including both sanitary and storm as well as open drain tile.

Certain other contractors—known as utility contractors or excavators—also perform pipe work in connection with outside installations such as storm drains and sewer pipes. Local 5 has no bargaining agreements with, and refers no plumbers to, utility contractors: it permits its members to work only for mechanical contractors under contract with Local 5 (J.A. 62, 106).[2]

In August 1959, Arthur Venneri Company ("Venneri") was selected as general contractor for a medical library project.[3] When Local 5 learned that Venneri had subcontracted the outside utilities work to Nickles Brothers, Inc. ("Nickles")—a utility contractor, party to a collective agreement with the Laborers Union (see n. 2, *supra*)—it protested to Venneri. Local 5 pointed to Clause 32 of its area agreement and threatened to refer no plumbers to any mechanical contractor to whom Venneri might award the inside utilities work (J.A. 59, 68). Local 5 and Venneri reached a settlement of the library dispute when Venneri agreed to use plumbers to perform all

[2] The utility contractors or excavators generally have contracts with the Hod Carriers and Common Laborers Union, which claims jurisdiction over the installation of non-metallic pipe (J.A. 33).

[3] Venneri does not have a contract with either Local 5 or the Laborers.

the mechanical work on two other projects then in process (J.A. 69–70, 113–114).

In December 1959, Local 5 learned that Venneri was to be general contractor on several projects at the Andrews Air Force Base. Its business agent telephoned Joseph Venneri, vice president of the Company, and warned him to avoid a repetition of the prior "trouble" (J.A. 34; 71). However, in letting subcontracts for one of these projects (the hangar job) Venneri again awarded the outside work to Nickles. The inside work was awarded to Akron Mechanical Contractors, Inc. ("Akron"), who then entered into the Local 5 bargaining agreement (J.A. 17, 32–33, 71; 112).[4]

When Local 5 found out that Akron had taken a contract for only the inside work, it complained that this violated Clause 32 of its agreement and threatened not to supply plumbers to Akron. In February 1960, in an effort to resolve the problem, Joseph Venneri arranged a meeting with representatives of Local 5 and Akron. Venneri explained that he could not give Akron all the work because he had already bound himself by contract with Nickles, but suggested that he could ask Nickles to perform all his mechanical work, both metallic and non-metallic, with plumbers.[5] Rhodes, Local 5's business manager, re-

[4] Shortly before Akron had been awarded the subcontract, it had been warned by Local 5 that working with Venneri might mean trouble (J.A. 35; 111–112).

[5] Nickles had assigned the non-metallic pipe work to the Laborers, in conformity with the latter's work claim (see n. 2, *supra*). Its request to Local 5 for plumbers to perform the metallic pipe work had been ignored (J.A. 79).

fused the offer because "we didn't do business with excavators" (J.A. 36; 68, 73). Rhodes added that there was no possible compromise; and that, while Venneri did not have to deal with Akron or any other specified employer, he had to award all of the mechanical work (both inside and outside) exclusively to a mechanical contractor under contract with Local 5 (J.A. 36; 67, 68, 73).

Thereafter, Local 5 refused to refer plumbers to Akron for work on the hangar job at Andrews Field (J.A. 38; 57, 58, 94–95). Moreover, it induced plumbers who had been referred to Akron in connection with its other projects at Andrews to refrain from working on the hangar project, from moving shipments of pipe destined for the hangars, and from fabricating pipe to be used there (J.A. 36, 37–38; 92–93).[1]

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that Local 5 violated Section 8(b)(4)(i)(B) of the Act by inducing and encouraging employees of Akron to refuse to handle or work upon materials destined for the hangar job, and Section 8(b)(4)(ii)(B) by refusing to refer plumbers to Akron for that job, as provided by the terms of its bargaining agreement with Akron. The Board found that an object of this union conduct was to force Akron to cease doing business with Venneri, or in the alternative, to force Venneri to cease doing business

[1] On these other projects, Akron had received contracts for both the inside and outside work. It was Akron's practice to shift plumbers from project to project when work on one became slack (J.A. 90, 95).

with Nickles (J.A. 3–4). The Board (with one Member dissenting) rejected Local 5's contention that, because it was merely furthering a primary dispute which it had with Akron as a result of Akron's violation of Clause 32 of the contract, it was engaged in legitimate primary activity. The Board found that the target of Local 5's action was not Akron but the subcontracting policy of Venneri, which Akron was powerless to control (J.A. 5–6). The Board (one Member dissenting) also rejected Local 5's contention that it was precluded from finding a violation of Section 8(b)(4)(B) of the Act until the merits of another charge filed against the Union, alleging a violation of Section 8(b)(4)(D), had been determined (J.A. 7–8).

The Board entered an order requiring Local 5 to cease and desist from the unfair labor practices found (J.A. 9–10).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's unfair labor practice findings, and enforced its order with a minor modification not here material (Pet. 1a–10a).

ARGUMENT

The decision of the court of appeals is clearly correct, and it is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. The Board found, and the court below sustained its finding, that petitioner's basic dispute was with Venneri, the general contractor, because of its policy

of subcontracting some of its plumbing work to "excavators" who were not under contract with Local 5; and that the pressure exerted on Akron, who was powerless to control that policy, was thus secondary and violative of Section 8(b)(4)(B) (J.A. 6; Pet. 4a, 6a). This finding is amply supported by the record,[7] and it accords with the conclusion reached in other cases involving a similar factual situation. See *Local 636, Plumbers* v. *National Labor Relations Board*, 278 F. 2d 858 (C.A.D.C.); *National Labor Relations Board* v. *Enterprise Association*, 285 F. 2d 642 (C.A. 2).

In view of the finding that Venneri was the real target, it is immaterial whether Clause 32 of petitioner's agreement with the mechanical contractors is a lawful "job protection" clause or an illegal "hot cargo" clause (Pet. 8–10). Assuming *arguendo* that it is the former,[8] the question still remains whether, in striking to enforce the clause, the union was primarily concerned with the employment policies of the employer who is party to the contract or with those of some other employer. Since the Board and the

---

[7] As the court below pointed out (Pet. 4a):

"The union warned Venneri in December 1959, apparently before Akron was in the picture, not to split the plumbing work, and reminded the contractor of previous trouble they had experienced on this point. The union also warned Grossman, the president of Akron, before the bargaining agreement was signed, that accepting work from Venneri might mean trouble. Furthermore, the discussion at the meeting on February 15, 1960, between Local 5, Akron and Venneri clearly showed that the union's primary concern was with Venneri's subcontracting policies and not with the policies of Akron."

[8] Both the Board and the court below found it unnecessary to decide this issue (J.A. 6; Pet. 5a).

court below found, with ample justification, that petitioner's primary concern was Venneri, and not Akron, at least an object of its pressure on Akron was secondary and hence the contract with Akron, however lawful, cannot aid it here. As this Court held in *Local 1976, Carpenters* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, a contract provision, even if valid on its face, does not afford a defense to conduct which would otherwise violate the secondary boycott provisions of the Act.[9]

The issue here is unrelated to that in *Local 761, IUE* v. *National Labor Relations Board*, 366 U.S. 667, and *Steelworkers, Local 5895* v. *National Labor Relations Board and Carrier Corp.*, No. 89, this Term (Pet. 10, 14–15). The problem here involves determining the employer with whom the union has its primary dispute—*i.e.*, is it with Venneri or with Akron? In *Local 761* and *Steelworkers*, on the other hand, it is clear with whom the union has the primary dispute; the question is whether the right to engage in primary picketing encompasses the right to make direct appeals to the employees of the secondary

[9] Although *Sand Door* involved a typical hot cargo clause which clearly has a secondary object, such a clause was not itself unlawful under the 1947 Act under which that case arose. Nor did the court below misapply *Sand Door* (see Pet. 9–10) by viewing it as precluding the court, in determining whether the union's object is primary or secondary, from looking to the nature of the contract clause relied on by the union. As shown above, the court assumed *arguendo* that Clause 32 might have a legitimate primary object but found from all the evidence that petitioner was pursuing an object which went beyond the possible legitimate purpose of the clause.

employer at the premises of the primary employer or at a point immediately adjacent thereto.

2. The second question raised by petitioner is undoubtedly important to the building and construction industry. The industry suffers many jurisdictional disputes, and the universal practice of subcontracting makes it possible in many cases to frame the resulting unfair labor practice charges under either Section 8(b)(4)(B) or 8(b)(4)(D). There was also a division of opinion in the Board on this question. We believe, nevertheless, that the decision below is so plainly correct as to warrant denial of the petition for further review. Section 8(b)(4)(B) bars secondary pressure for an object of forcing one person to cease doing business with another. Section 8(b)(4)(D) bans strikes or related pressure (whether primary or secondary) for an object of forcing an employer "to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." Since the objectives prohibited by each section are different, it is entirely possible to find that the union has violated one section but not the other; conversely, if it be found that the union possesses both of the illegal objectives, there is no reason why its con-

duct should not be held violative of two sections of the Act rather than only one.

Nor is a different conclusion required by the circumstance that a Section 8(b)(4)(D) proceeding requires the Board first to attempt to resolve the underlying jurisdictional dispute under the procedures of Section 10(k), and that such resolution may result in the Board finding that the striking union is "entitled" to the work in dispute. Assuming that the Board were to find, in the pending Section 10(k) proceeding, that petitioner, by custom, tradition or contract, was entitled to be assigned both the inside and outside plumbing work, the Board's order in the instant case would not nullify that award by precluding a strike for the work. The order merely bars petitioner from resorting to the pressure of a strike against the secondary employer; it would not bar it from exerting pressure (such as picketing) against the primary employer even though the latter may not directly employ members of the union aggrieved. As the court below observed (Pet. 9a), this is a reasonable accommodation between Sections 8(b)(4)(B) and 8(b)(4)(D) for it simply requires the union "to restrict its pressure in such a situation to the employer who can satisfy its demands."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
*Acting Solicitor General.**

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GARY GREEN,
Attorney,
National Labor Relations Board.

OCTOBER 1963.

---

*In place of the Solicitor General, who has disqualified himself for personal reasons.